IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1792 OF 1991

1. Shri Mahendra Chaturbhuj Patel,)
Since deceased by his heirs,)

1/1. Shri Hiren Mahendra Patel,)
age 32 years,)

1/2. Shri Bhavesh Mahendra Patel,)
Age 27 years,)

1/3. Smt.Kalpana Dharmedra Patel,)
Age 22 years,)

1/4. Smt.Puloma Vidnyan Patel,)
Age 22 years,)

1/5. Smt.Savitaben Mahendra Patel,)
Age 50 years,)

Occupation- 1/1, 1/2 Business,)
1/3 to 1/5 Household work,)
No.1/1 to 1/3 & 1/5 residing at)
Dahanu Road, No.1/4 residing at)
Dahisar (West), Navgam Church,)

2. Shri Kirit Chaturbhuj Patel,)
age 44 years,)
Occupation-Business,)
R/o.Dahanu Road, Taluka-Dahanu,)
District - Thane.)..Petitioners
(Org.Plaintiffs)

Versus

Shri Mohamad Afzal Mohamadali,)
Age 65 years, Occupation- Business,)
residing at Dahanu Road,)
Tal. Dahanu, District - Thane.)..Respondent
(Org.Defendant)

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Shri Premji V. Palan for the petitioners.

Mrs.A.R.Lambay i/b Lambay & Co.for the respondent.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 1st December, 2004.

Oral Judgment :

1. Heard the learned advocates for the parties. Perused the records.

2. The petitioners challenge the judgment and order dated 21st November, 1990 passed by the lower appellate Court allowing the appeal filed by the respondent against the decree of eviction which was passed by the trial Court in Regular Civil Suit No.65 of 1987. The lower appellate Court by the impugned order has set aside the decree of eviction and dismissed the suit. The suit was filed for eviction of the respondent on the ground of default in payment of rent.

3. Few facts relevant for the decision are that the petitioners are the owners of a chawl consisting of 12 galas situated at Old Dahanu Jawhar Road at Malyan. The respondent is a tenant in respect of the Gala No.1 and monthly rent payable is Rs.75/-. The

petitioners issued a notice in terms of the provisions comprised under Section 12(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter called as "the said Act", on 24th February, 1979 which was served upon the respondent on 26th February, 1979 calling upon the respondent to pay the arrears of rent from 1st September, 1970 to 31st January, 1979 amounting to Rs.7,575/-. The contractual tenancy was also sought to be terminated by the said notice. On receipt of the said notice, the respondent filed the application under Section 11(3) of the said Act and the same was filed on 22nd March, 1979 for the purpose of fixation of the standard rent being the Application No.5 of 1979. In the said proceedings for fixation of the standard rent and the interim order passed on 26th November, 1979 fixing the standard rent at the rate of Rs.65/- per month, and the respondent was directed to deposit the arrears of rent amounting to Rs.7,280/- being the rent upto December, 1979 on or before 3rd January, 1980 and further to continue to deposit the rent as and when it accrues at the rate of Rs.65/-, the respondent deposited the rent in accordance with the said order till 16th December, 1981. The respondent, however, did not deposit the further rent. The application for fixation of standard rent being Application No.5 of

1979 came to be dismissed for non-prosecution on 11th February, 1986. Subsequent thereto, on 5th August, 1987, the petitioners initiated the eviction proceedings against the respondent on the ground of default in payment of rent.

4. The proceedings were sought to be contested by the respondent on the ground that there was no cause of action for filing the suit, as the plaint did not disclose the claim for arrears of rent corresponding to the claim for arrears in the notice issued under Section 12(2) of the said Act. It was also the case of the respondent that all the arrears in relation to the notice dated 24th February, 1979 having already been paid, the suit could not have been filed based on the said notice after payment of the said dues and in the absence of cause of action for filing the suit, the same was liable to be dismissed. The trial Court however decreed the suit holding that the respondent was in arrears of rent for more than six months and therefore he is liable to be evicted from the suit premises. The lower appellate Court, however, set aside the said decree of eviction holding that, on the date of filing of the suit, the rent claimed under the Notice dated 24th February, 1979 had already been paid and consequently, in the absence of fresh notice under

Section 12(2) of the said Act, the suit was not maintainable. Hence the present petition.

5. While challenging the impugned order, the learned advocate for the petitioners submitted that the respondent had failed to pay the rent after December, 1981 and in any case, consequent to the issuance of the notice dated 24th February, 1979 in view of the default in payment of rent for more than six months by the respondent, the petitioners were justified in initiating the proceedings for eviction of the respondent, and it was necessary for the respondent to justify the cause for non-payment of rent for the said period for which the rent was demanded under the notice, failing which, the petitioners were entitled for eviction of the decree. Besides, the respondent having failed to deposit the rent regularly after December, 1981, there was failure on the part of the respondent to comply with the requirement of Section 12(3) (b) of the said Act, and on that count, the eviction order was justified. According to the learned advocate for the petitioners, the lower appellate Court erred in holding that consequent to the payment of amount demanded under the said notice, the petitioners had no cause of action for initiating the eviction proceedings without

issuance of a fresh notice. Reliance is sought to be placed in the decision in the matter of **Manorama S. Masurekar v. Dhanlaxmi G. Shah,** reported in 1965 Vol.58 BLR 412, **Hasmukhben Devendra Shukla & Ors. v. Dr.Nilkanth Pravinshankar Dave,** reported in 1998(2) LJ 263 and **Smt.Shakuntala S. Tiwari V. Hem Chand M. Singhania,** reported in AIR 1987 SC 1823.

6. On the other hand, the learned advocate appearing for the respondent, placing reliance in the decision of the Division Bench in the matter of **Smt.Shantabai Vishnumal v. Ganpat Ladha & Ors.,** reported in AIR 1976 Bombay 288 submitted that the lower appellate Court, in its discretion, having considered that there was due compliance of Section 12(3)(b) of the said Act inasmuch as the respondent had deposited all the arrears of rent immediately after filing of the suit, held that there is no case for interference in the impugned order in exercise of writ jurisdiction.

7. Upon hearing the learned advocate for the parties and on perusal of the records, a short point which arises for consideration in the matter is, what is the limitation for initiation of the eviction proceedings consequent to the issuance of the notice

under Section 12(2) of the said Act. Simultaneously, it is also necessary to ascertain whether the payment of amount of arrears of rent demanded under the Notice under Section 12(2) of the said Act would result in cessation of cause of action for initiating eviction proceedings based on such notice and that therefore in order to initiate the eviction proceedings, it would be necessary for the landlord to issue fresh notice under Section 12(2) of the said Act.

8. As already seen above, undisputed facts of the case are that the notice under Section 12(2) of the said Act was served upon the respondent on 26th February, 1979 and within the period of one month the respondent initiated the proceedings for fixation of standard rent being Application No.5 of 1979 and paid the arrears of rent till 16th December, 1981. The proceedings for fixation of the standard rent came to be dismissed for non-prosecution on 11th February, 1986 and thereafter on 5th August, 1987, the petitioners initiated the eviction proceedings against the respondent. There was no notice issued by the petitioners under Section 12(2) before initiation of the proceedings and after service of the earlier notice dated 24th February, 1979.

9. The point as regards the period of limitation to initiate proceedings for eviction pursuant to the issuance of notice under Section 12(2) of the said Act, in fact, has been well settled consequent to the decision of the Apex Court in **Shakuntala Tiwari's case (supra).** In the said case, which arose in relation to the provisions of the said Act, the Apex Court had held that "This is indubitably a suit by the landlord against the tenant to recover possession from the tenant. Therefore the suit clearly comes within Art.67 Limitation Act. The suit was filed because the tenancy was determined by the combined effect of the operation of Ss.12 and 13, Bombay Rent Act. In this connection, the terms of Sections 12 and 13 of the Bombay Rent Act may be referred to. At the most it would be within Art.66, Limitation Act, if we hold that forfeiture has been incurred by the appellant in view of the breach of the conditions mentioned in S.13, Bombay Rent Act and on lifting of the embargo against eviction of tenant in terms of S.12 of the said Act. That being so, either of the two, Art.66 or Art.67 would be applicable to the facts of this case; there is no scope of the application of Art. 113, Limitation Act, in any view of the matter. Sections 12 and 13, Bombay Rent Act, co-exist and must be harmonised to effect the purpose and intent of the

legislature for the purpose of eviction of the tenant. In that view of the matter Art. 113, Limitation Act, has no scope of application. Large number of authorities were cited. In the view we have taken on the construction of the provisions of Arts.67 and 66, Limitation Act, and the nature of the cause of action in this case in the light of Ss.12 and 13, Bombay Rent Act, we are of the opinion that the period of limitation in this case would be 12 years."

10. The law being well settled by the above decision of the Apex Court, it is to be held that once the notice under Section 12(2) is issued, the period for initiating the proceedings for eviction would be of 12 years to be counted from the date of the expiry of 30 days from the date of service of such notice upon the tenant. Undoubtedly, certain facilities in the matter of payment of rent are made available to the tenants under Sections 11 and 12 of the said Act. However, those facilities by themselves do not result in wiping out the effect of the service of the notice disclosing the intention of the landlord to initiate proceedings on account of default in payment of rent. Further, clauses (a) and (b) of Sub-section (3) of Section 12 themselves disclose that even after the payment of rent, it is obligatory upon the tenant to

justify the delay in payment of rent. Clause (a) of Section 12(3) makes it obligatory for the Court to issue a decree of eviction in case the tenant fails to pay rent within one month from the date of the notice, in case the rent is payable by the month and when there is no dispute regarding the amount of standard rent and permitted increases. In other words, if there is no dispute between the parties about the quantum of standard rent or permitted increases and the notice in that regard is issued by the landlord disclosing the amount of arrears of rent and yet the tenant fails to pay such arrears within one month from the receipt of such notice, the Court is left with no option but to issue a decree of eviction. Under clause (b) of Section 12(3) of the said Act which applies to the cases whereby the rent is payable by month, the Court is not obliged to pass decree of eviction in case where the tenant on the first date of hearing of the suit pays or tenders permitted increases then due, and thereafter continues to pay or tender in Court regularly such rent and permitted increases till the suit is finally decided and also pays costs of the suit.

11. The said provisions, therefore, nowhere disclose any favourable decree to be passed in favour

of the tenant merely because tenant pays the rent immediately after the receipt of the notice or even after initiation of the proceedings, i.e. on the first date of hearing, but the same certainly grants concession to the effect that no decree could be passed immediately on initiation of the proceedings, if the obligations contemplated thereunder in relation to the payment of rent by the tenant are complied with. That cannot be construed to mean that on mere compliance of those obligations, the suit for eviction will have to be dismissed. The right of the landlord to seek eviction of a tenant who does not comply with his obligation regarding payment of consideration for his occupation of the rented premises has been clearly assured under Section 12(1) of the said Act itself. Undoubtedly, certain embargoes have been imposed on such right and those embargoes are disclosed in Sub-sections (2) to (4) of Section 12 of the said Act. However, moment those embargoes are lifted, nothing would prevent the landlord from seeking eviction of a tenant on the ground of default in payment of rent and if, once such proceeding are initiated it would be for the tenant to justify the delay in payment of rent and on satisfaction of the explanation in that regard, certainly the Court will have to dismiss the proceedings on that count.

12. As regards the contention that consequent to the payment of entire arrears claimed under the notice, cause of action for eviction ceases to exist and the landlord is required to issue a fresh notice under Section 12(2) of the said Act before initiating the eviction proceedings, the same is no more available to the respondent in view of the decision of the Apex Court in **Smt.Shakuntala Tiwari's case (supra)** itself. Once it is held that the period of limitation for initiation of eviction proceedings based on issuance of notice under Section 12(2) of the said Act to be of 12 years, merely because the tenant has cleared the dues subsequent to the issuance of notice, cause of action which had arisen in terms of Section 12(1) of the said Act would not cease to exist. Besides, if the contention of the respondent in that regard is accepted, then it would lead to a strange situation inasmuch as that at every default, the rent being cleared pursuant to the issuance of notice, the landlord will have to go on issuing notice after notice, and there may not be an occasion at all for the landlord to seek eviction of a tenant on the ground of default in payment of rent. The ground for eviction on the basis of default in payment of rent being statutory right recognized in favour of the

landlord, by interpreting the Section 12(2) to the benefit of a tenant in the manner it is sought to be argued, cannot be wiped out. It would virtually result in legislating upon the statutory provision by this Court if the contention of the respondent is accepted and certainly that is not the function of the Court.

13. The Division Bench of this Court in **Manorama S. Masurekar's case (supra),** while dealing with the Section 12(3)(a) of the said Act, held that the Court should pass a decree if tender of rent is made after a month's period after notice under Section 12(2) of the said Act had expired and the fact that the tender of rent was made before a suit for ejectment is filed by the landlord, that would not give protection to the tenant under Section 12(1) of the said Act.

14. The learned Single Judge of this Court in **Hasmukhben Devendra Shukla's case (supra)** has clearly held that the payment of arrears of rent pursuant to the notice within a period of one month does not amount to waiver of right to initiate a proceeding for eviction on the ground of default in payment of rent and inspite of the clearance of arrears of rent within such period pursuant to the issuance of such notice

under Section 12(2) of the said Act, the landlord would be entitled to initiate eviction proceeding on the ground of default in payment of rent.

15. For the reasons stated above, therefore, the lower appellate Court clearly erred in holding that the suit was not maintainable or that there was need for issuance of fresh notice under Section 12(2) of the said Act before initiating the eviction proceedings in the case in hand, and as rightly submitted by the learned advocate for the petitioners, the lower appellate Court erred in interfering the decree of eviction passed against the respondent by the trial Court.

16. The learned advocate for the respondent has sought to rely upon the decision in **Shantibai Vishnumal's case (supra).** It is most unfortunate that the learned advocate for the respondent has ventured to rely upon a decision which has been clearly set aside by the Apex Court. The said decision was set aside by the Apex Court in the matter of **Ganpat Ladha v. Sashikant Vishnu Shinde,** reported in AIR 1978 SC 955. It is highly improper for the learned advocate for the respondent to rely upon the decision which has been set aside by the Apex Court. The Apex Court in

the said decision has clearly ruled thus:-

> "11. It is clear to us that the Act interferes with the landlord's right to property and freedom of contract only for the limited purpose of protecting tenants from misuse of the landlord's power to evict them, in these days of scarcity of accommodation, by asserting his superior rights in property or trying to exploit his position by extracting too high rents from helpless tenants. The object was not to deprive the landlord altogether of his rights in property which have also to be respected. Another object was to make possible eviction of tenants who fail to carry out their obligation to pay rent to the landlord despite opportunities given by law in that behalf. Thus, S.12(3)(a) of the Act makes it obligatory for the Court to pass a decree when its conditions are satisfied as was pointed out by one of us (Bhagwati,J.) in Ratilal Balabhai Nazar v. Ranchodbhai Shankerbhai Patel, AIR 1968 Guj 172. If there is statutory default or neglect on the part of the tenant, whatever may be its cause, the landlord acquires a right under S.12 (3)(a) to

get a decree for eviction. But where the conditions of S.12(3)(a) are not satisfied, there is a further opportunity given to the tenant to protect himself against eviction. He can comply with the conditions set out in S.12(3)(b) and defeat the landlord's claim for eviction. If, however, he does not fulfil those conditions, he can not claim the protection of S.12(3)(b) and in that event, there being no other protection available to him, a decree for eviction would have to go against him. It is difficult to see how by any judicial valour discretion exercisable in favour of the tenant can be found in S.12(3)(b), even where the conditions laid down by it are satisfied, to be strictly confined within the limits prescribed for their operation. We think that Chagla, C.J., was doing nothing less than legislating in Kalidas Bhavan's case ((1958) 60 Bom LR 1359) (supra), in converting the provisions of S.12(3)(b) into a sort of discretionary jurisdiction of the Court to relieve tenants from hardship. The decisions of this Court referred to above, in any case, make the position quite clear that S.12(3)(b) does not

> create any discretionary jurisdiction in the Court. It provides protection to the tenant on certain conditions and these conditions have to be strictly observed by the tenant who seeks the benefit of the section. If the statutory provisions do not go far enough to relieve the hardship of the tenant the remedy lies with the legislature. It is not in the hands of Courts."

17. The law on the point being well settled that the Courts are left with no discretion in the matter where the statutory provisions require the Court to pass a decree of eviction in certain situation, the question of exercising discretion even by this Court does not arise at all.

18. For the reasons stated above, the impugned judgment and order is quashed and set aside. The order of eviction passed by the trial Court is restored. The respondent is directed to deliver the vacant and peaceful possession of the suit premises to the petitioners on or before 31st March, 2005. The rule is made absolute in above terms with no order as to costs.